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No. 97-288

Supreme Court, U.S.
FILED
JAN 28 1998
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

VICKY LEWIS AND GARY LEWIS, INDIVIDUALLY, AS PARENTS, AS NEXT FRIENDS, AND AS ADMINISTRATORS OF THE ESTATE OF KATHRYN C. LEWIS,

Petitioners,

v.

BRUNSWICK CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the Federal Boat Safety Act of 1971 preempts a state common law requirement that recreational boats be equipped with propeller guards, where the United States Coast Guard, after extensive administrative proceedings, expressly rejected such a requirement on the grounds that it would be contrary to the interests of boat safety and not economically justified.

RULE 29.6 STATEMENT

Pursuant to S. Ct. Rule 29.6, respondent Brunswick Corporation refers to and incorporates by reference the list of its nonwholly owned subsidiaries submitted with its Brief for the Respondent in Opposition (at ii) in this case.

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National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce, 92d Cong., 1st Sess. (1971) . *passim*

Recreational Boat Safety: Hearings on H.R. 15041, 15140 Before the Subcomm. on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Comm. on Merchant Marine & Fisheries, 91st Cong., 2d Sess. (1970) 3, 6-7

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 107 F.3d 1494. The district court's order granting respondent's motion for summary judgment (Pet. App. A26-A32) is reported at 922 F. Supp. 613.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1997, and a petition for rehearing was denied on May 15, 1997. The petition for a writ of certiorari was filed on August 13, 1997, and was granted on November 14, 1997. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 9 of the Federal Boat Safety Act of 1971, as amended and codified at 46 U.S.C. § 4305, provides:

> If the Secretary considers that recreational vessel safety will not be adversely affected, the Secretary may issue an exemption from this chapter or a regulation prescribed under this chapter.

Section 10 of the Federal Boat Safety Act of 1971, as amended and codified at 46 U.S.C. § 4306, provides:

> Unless permitted by the Secretary under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of the Secretary's disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous

conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

Section 40 of the Federal Boat Safety Act of 1971, as amended and codified at 46 U.S.C. § 4311(g), provides:

> Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.

STATEMENT

A. The Boat Safety Act

The Federal Boat Safety Act of 1971, as amended and codified at 46 U.S.C. §§ 4301-4311 ("Boat Safety Act" or "Act"), was enacted by Congress to "improve boating safety and to foster greater development, use, and enjoyment of all the waters of the United States." Pub. L. No. 92-75, § 2, 85 Stat. 213, 214 (1971). Congress sought to achieve these goals by, among other means, "encouraging and assisting participation by the several States, the boating industry, and the boating public in development of more comprehensive boating safety programs" and by "authorizing the establishment of national construction and performance standards for boats and associated equipment." *Ibid.*

Before the Boat Safety Act was enacted, the existing federal statutes governing boat safety — the Motorboat Act of 1940 and the Federal Boating Act of 1958 — did "not meet [the] current requirements of safe boating." H.R. Rep. No. 92-324, 92d Cong., 1st Sess. 9 (1971) ("House Report"). The Motorboat Act of 1940 imposed limited requirements for "certain safety equipment and measures such as life preservers, [and] fire extinguishers * * *." S. Rep. No. 92-248, 92d Cong., 1st Sess. 13 (1971) ("Senate Report"). The narrow scope of this statute and the "inflexibility of the statutory requirements" undermined its utility at a time when boat usage was growing rapidly in the late 1960s and early 1970s. *Id.* at 13-14. The Federal Boating Act of 1958 was even narrower — "primarily a boat numbering statute." House Report at 9; see also 117 Cong. Rec. H6490 (daily ed. July 8, 1971) (statement of Rep. Monagan) (noting the "limited scope" of the 1940 and 1958 statutes).

With "40 million participants boating on over 25 million square miles of waters" in 1971, Senate Report at 13, Congress concluded that a more comprehensive boat safety scheme was needed. Toward that end, and in particular to "reduce the level of fatalities now resulting from boating mishaps," Congress enacted the Boat Safety Act to establish "a coordinated national boating safety program." *Id.* at 1, 13.

The Boat Safety Act had three principal components. First, the Act provided for the establishment of "a standard numbering system for vessels" to be administered by the States under the authority and with the approval of the United States Coast Guard.[1] See Pub. L. No. 92-75, §§ 17-24, 85 Stat. at 220-222 ("Numbering of Certain Vessels"). This program was a reiteration and expansion of the "numbering system required by the 1958 Act." *Recreational Boat Safety: Hearings on H.R. 15041, 15140 Before the Subcomm. on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Comm. on Merchant Marine & Fisheries*, 91st Cong., 2d Sess. 57 (1970) ("House Hearings") (statement of Rear Admiral Joseph J. McClelland, U.S. Coast Guard); see also Senate Report at 6.

Second, "to encourage greater State participation and consistency in boating safety efforts, and particularly greater safety patrol and enforcement activities," the Boat Safety Act authorized and funded "State boating safety programs," under the auspices of the Coast Guard, that were "directed at implementing and supplementing" the Act. Pub. L. No. 92-75, §§ 25-33, 85 Stat. at 224-227 ("State Boating Safety Programs"). Pursuant to this scheme, the Coast Guard could approve and fund a state boating safety program if the program provided for, among other things, patrol and law enforcement activities, as well as "boating safety education." *Id.* § 26(a). The Coast Guard was acutely aware that it needed the assistance of state

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[1] The statute vests authority under this and all of its other provisions in the Secretary of Transportation. The Secretary, in turn, has delegated to the Coast Guard the responsibility of "[c]arrying out the functions vested in the Secretary by the [Boat Safety Act]." 49 C.F.R. § 1.46(n)(1). Accordingly, we refer to the Coast Guard rather than to the Secretary in discussing the responsibilities of the Department of Transportation under the Act.

and local authorities to patrol navigable waters and to enforce boat safety laws and regulations. See House Hearings at 57 ("we look to State and local jurisdictions to enforce those safety requirements with which the operator must comply" and "[f]rom a purely economic view point, it is less costly to enforce the law on internal waters with State and local officials") (statement of Rear Admiral McClelland); *id.* at 71 ("The Coast Guard has stated that enforcement should be a State and local police function") (statement of Rep. Clark).

The third and most significant component of the Boat Safety Act mandated the creation of a comprehensive program of national boat construction and performance standards and requirements for associated equipment. Section 5(a) of the Act (as amended and codified at 46 U.S.C. § 4302(a)) states that the Coast Guard may prescribe regulations:

> (1) establishing minimum safety standards for recreational vessels and associated equipment, and establishing procedures and tests required to measure conformance with those standards, with each standard —
>
> (A) meeting the need for recreational vessel safety; and
>
> (B) being stated, insofar as practicable, in terms of performance;
>
> (2) requiring the installation, carrying, or use of associated equipment * * *.

In considering whether to adopt a standard, the Coast Guard must "consult with" the National Boating Safety Advisory Council ("the NBSAC" or "Council"), 46 U.S.C. § 4302(c)(4),[2] a group of experts

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[2] As part of the standard-setting process under the Act, the Coast Guard must also (46 U.S.C. § 4302(c)):

> (1) consider the need for and the extent to which the regulations will contribute to recreational vessel safety;
>
> (2) consider relevant available recreational vessel safety standards, statistics, and data, * * *; [and]

(continued...)

and other persons interested in boat safety established under the terms of the "State Boating Safety Programs" component of the Act, see 46 U.S.C. § 13110. One third of the 21 members of the Council must be state boat safety administrators.[3]

B. Federal Preemption Under the Boat Safety Act

The Coast Guard's plenary authority under the Boat Safety Act to require manufacturers to comply with "national construction and performance standards for boats and associated equipment," Senate Report at 15, is buttressed by a sweeping provision for federal preemption of state law. Congress decided that the standards and requirements established by the Act must be nationally uniform (*id.* at 14): "The need for uniformity in standards if interstate commerce is not to be unduly impeded supports the establishment of uniform construction and equipment standards at the Federal level."

Indeed, in the congressional deliberations over the enactment of the Boat Safety Act, witnesses repeatedly emphasized the pressing "need for uniformity in standards." House Report at 29. For example, John H. Reed, Chairman of the National Transportation Safety Board, stated (*ibid.*):

> All but three States now have boating legislation, and a number of States have boating laws which are more comprehensive than the present Federal laws governing boat registration and safety. * * * Unless the Federal Government establishes a uniform

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[2] (...continued)

> (3) not compel substantial alteration of a recreational vessel or item of associated equipment that is in existence * * * but * * * may require [such] compliance or performance, to avoid a substantial risk of personal injury to the public * * *.

[3] The members of the NBSAC, who are appointed by the Secretary of Transportation, must have expertise, knowledge, and experience in recreational boating safety. 46 U.S.C. § 13110(a). The NBSAC members are selected from, and represent, three different constituencies: (a) seven state officials responsible for state boat safety programs; (b) seven representatives of recreational vessel and associated equipment manufacturers; and (c) seven representatives of national recreational boating organizations and the general public. *Id.* § 13110(b)(1).

> minimum safe-boating program, the lack of uniformity between States will pose an increasing burden on the boating public. The mobility of trailered boats, and contiguity of some waters to several States now present serious problems to law-abiding recreational boaters.

See also House Hearings at 61 ("several States are developing requirements of their own in law which are varied and it is quite important for both the convenience of the boatmen and for the manufacturer, too, to insure that these standards are uniform throughout the country") (statement of Rear Admiral McClelland); *National Boating Safety Program: Hearing on S. 696 Before the Merchant Marine Subcomm. of the Senate Comm. on Commerce*, 92d Cong. 1st Sess. 101 (1971) ("Senate Hearing") ("A proliferation of dissimilar standards would give the manufacturer — and the boatman for that matter — an impossible task. Federal preemption over any law or regulation which establishes boat or associated equipment safety standards is imperative now") (statement of Rep. Monagan).

To achieve national uniformity, and in deference to the "long history of preemption in maritime safety matters" (Senate Report at 20), Congress included the following broad preemption provision in the Act (46 U.S.C. § 4306):

> Unless permitted by the [Coast Guard] under section 4305 of this title, a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment (except insofar as the State or political subdivision may, in the absence of [the Coast Guard's] disapproval, regulate the carrying or use of marine safety articles to meet uniquely hazardous conditions or circumstances within the State) that is not identical to a regulation prescribed under section 4302 of this title.

The preceding section of the Act (46 U.S.C. § 4305) authorizes the Coast Guard to "issue an exemption" from the uniform national construction and performance standards and equipment requirements adopted under the statute, but only if "recreational vessel safety will not be adversely affected."

Section 4306 thus insures that boat manufacturers are not subject to "widely varying local requirements." Senate Report at 20. By mandating that any state laws, regulations, or requirements be "identical" to regulations issued by the Coast Guard, the preemption clause is exceptionally broad. Indeed, the House Report emphasized (at 11) that this provision "preempts the field on boating standards or regulations."[4]

Congress' clear decision to preempt the "field" of boat construction standards and equipment requirements contrasts sharply with its emphasis on state involvement in other parts of the Act (see pages 2-5, *supra*). "While Federal preemptive measures are necessary to assure uniformity of safety standards, quite the contrary is true of enforcement and education." House Hearings at 57 (statement of Rear Admiral McClelland). In those areas, "State participation is vital." Senate Hearing at 43 (statement of Admiral Chester R. Bender, Commandant of the Coast Guard). As the Senate Report on the Act concluded (at 13), "the very magnitude of the boating safety problem * * * suggests that an effective program of education, enforcement, and assistance must actively involve the States."[5]

C. The "Savings Provision" of the Boat Safety Act

Late in the course of congressional consideration of the Boat Safety Act, the Senate Commerce Committee added a so-called "Savings Provision" to the end (Section 40) of the Senate version (S.

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[4] In cases where it is necessary to address local "uniquely hazardous conditions or circumstances," 46 U.S.C. § 4306, the preemption provision allows the States to "impose requirements with respect to carrying or using marine safety articles which go beyond the federal requirements." See Senate Report at 20. Consistent with the "field" preemption intended by Congress over construction and performance standards and equipment requirements, however, the statute reserves to the Coast Guard a "right of disapproval" over even these limited state requirements "to insure that indiscriminate use of state authority does not seriously impinge on the basic need for uniformity." *Ibid.*

[5] The Boat Safety Act also "does not preempt state law or regulation directed at safe boat operation and use, which was felt to be appropriately within the purview of state or local concern." Senate Report at 20.

696). See Senate Report at 31. This provision, as later amended and codified, states (46 U.S.C. § 4311(g)): "Compliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." The Senate Report explained (at 32) that the

> purpose of the section is to assure that in a product liability suit mere compliance by a manufacturer with the minimum standards promulgated under the Act will not be a complete defense to liability. Of course, depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value.

Thereafter, the Conference Committee agreed to the Senate's "Savings Provision" amendment. The only discussion of the amendment in the House was a brief colloquy on the House floor in which Rep. Grover described the provision as "basically [a] technical amendment[] put in on the Senate side in which we of the minority of the Committee on Merchant Marine and Fisheries have concurred." 117 Cong. Rec. H7362 (daily ed. July 21, 1971). After this fleeting discussion, the Senate's "technical" amendment "was concurred in" by the House (*ibid.*), and the Act was adopted.

D. The Coast Guard's Decision That Propeller Guards Should Not Be Required

Immediately after passage of the Boat Safety Act, the Secretary of Transportation exercised the authority granted by Section 9 of the Act (46 U.S.C. § 4305) to exempt temporarily — until the Coast Guard adopted federal boat construction and performance standards and equipment requirements — all state boat safety laws, regulations, and requirements "in effect on the effective date of the Federal Boat Safety Act of 1971." 36 Fed. Reg. 15764, 15765 (1971). Two years later, after it had promulgated federal standards and requirements, the Coast Guard rescinded the Secretary's general exemption of state laws, regulations, and requirements. 38 Fed. Reg. 6914 (1973).

In subsequent years, the Coast Guard has promulgated a host of federal boat and motor design standards and other requirements for marine equipment. See 33 C.F.R. Subchapter S. In particular, the Coast Guard has adopted a number of "Equipment Requirements" and design standards in 33 C.F.R. Parts 175, 183, including design

requirements for marine motors, boat flotation materials, electrical systems, fuel systems, personal floatation devices, visual distress signals, and ventilation systems. See *id.* Part 175 (Subparts B-D), Part 183 (Subparts D-L).

In the late 1980s, the Coast Guard considered whether to adopt an equipment requirement that would compel manufacturers to install propeller guards on their boat engines. As directed by Section 4302(c)(4), the Coast Guard consulted with the NBSAC and requested that the Council study the issue. The Coast Guard's charge to the Council in April 1988 asked it to:

- Review the available data on the prevention of propeller-strike accidents and the Coast Guard study of various methods of shrouding propellers to prevent contact with a person in the water.

- Assess the arguments for and against some form of mechanical guard to protect against propeller strikes reflecting the positions of state boating law administrators, the recreational boating industry, and the boating public.

National Boating Safety Advisory Council, *Report of the Propeller Guard Subcommittee* ("Subcommittee Report"), J.A. 75. In particular, the Coast Guard asked the Council whether there should be "a federal requirement for some form of propeller guard." J.A. 76; Pet. App. A6. The Coast Guard also asked the Council to consider and assess several different "propeller guard designs." J.A. 76.

In response to the Coast Guard's request, the NBSAC established a Propeller Guard Subcommittee to consider the issue after gathering information from a wide range of public and private sources. J.A. 46. The Subcommittee, which was chaired by a state official responsible for the enforcement of boat safety laws and which included a Coast Guard representative (*ibid.*), received and reviewed files and information supplied by the Coast Guard. J.A. 47. In addition, the Subcommittee solicited and reviewed "files, data, case histories and other information" from diverse individuals and organizations interested in boat safety, *id.* at 47, 77-87, such as representatives of boat manufac-

turers and counsel representing injured persons in product liability actions (including counsel for petitioners in this case). *Id.* at 47-50.[6]

During its extensive fact-finding activities conducted over 18 months, the Subcommittee held public meetings across the country, providing interested persons and organizations the opportunity to present testimony on whether propeller guards should be required by the Coast Guard. J.A. 88-94. In its comprehensive review, the Subcommittee examined "[v]arious types of propeller guards, both commercially available and experimental, underwater motor housing appendages and other relevant materials," and operated boats equipped with and without guards. *Id.* at 47-48.

Evidence produced to the Subcommittee indicated that "boating fatalities involving the propeller" number "approximately 30-49 * * * per year." J.A. 92. "On an absolute basis this is one third to one half the number of fatalities associated with being struck by lightning." *Ibid.* Indeed, in light of the large number of people who use recreational vessels each year (the "boat population" of the United States exceeded 17 million in 1988, *id.* at 56), the number of propeller incidents was small compared to the total number of boating accidents. *Id.* at 57, 95-101; see also *id.* at 72 ("the propeller itself is the sole factor in only a minority of impacts").

After its extensive fact-finding was completed, the Subcommittee unanimously adopted a lengthy Report, which concluded that "[t]he U.S. Coast Guard should take no regulatory action to require propeller guards." J.A. 73. Among the significant safety concerns supporting this recommendation were the lack of a feasible propeller guard for *any* pleasure craft traveling at normal operating speeds ("propeller guards affect boat operation adversely at speeds greater than 10 miles per hour" (Pet. App. A7)), serious steering and handling problems caused by propeller guards (along with increased drag, loss of speed, and dramatically reduced power and fuel efficiency), and increased safety problems posed by such devices (such as the new and increased

[6] At least six of the 24 individuals contacted by the Subcommittee were either attorneys or expert witnesses retained by plaintiffs to advocate the use of propeller guards. J.A. 77-80.

impact hazard created by propeller guards and the danger that arms and legs will be trapped by "ring-type guards").[7] J.A. 62-74.

Given these substantial safety concerns, the Report concluded that "[t]he development and use of devices such as 'propeller guards' can * * * be counter-productive and can create new hazards of equal or greater consequence." J.A. 72.[8] In short, the Subcommittee determined that propeller guards could make boating *less safe*. Moreover, in light of the small number of propeller-strike incidents, requiring installation of a propeller guard on recreational boats would not make economic sense. *Id.* at 71. As a result, the Subcommittee recommended that there should be no propeller guard requirement and cautioned that the "boating public must not be misled into thinking there is a 'safe' device which would eliminate or significantly reduce * * * injuries or fatalities." *Id.* at 73.

The full NBSAC considered the Subcommittee's Report at its meeting in November 1989. See *Minutes of the 44th Meeting of the National Boating Safety Advisory Council* at 17-19 (Nov. 6-7, 1989) (J.A. 134-139). The 21 members of the Council, representing state governments, boat manufacturers, and the interested public, voted

[7] Most propeller guards increase significantly the "underwater profile" of a boat, "thereby increasing the chances of [underwater] contact." J.A. 67-69. Thus, although propellers alone "present the hazard of cutting wounds and penetration of the body," propeller guards "present the additional hazard of blunt trauma injuries, which are often more severe." *Ibid.* For example, "a skull impact at 10 mph or more in the water would be generally fatal." *Id.* at 66. The Subcommittee Report (*id.* at 69) also noted that so-called "ring-type guards" create "a new hazard" of arms and legs being "caught by the bars or ring and held against the rotating propeller."

[8] "After considering the available data on propeller-strike accidents [and] the testimony of numerous experts, the subcommittee determined that propeller guards are not feasible for recreational boats because they decrease an operator's ability to maintain control over the boat at 'normal' speeds, *increase* the probability of striking a body in the water, and create a possibility of causing greater injury to those struck." *Mowery* v. *Mercury Marine, Division of Brunswick Corp.*, 773 F. Supp. 1012, 1016 (N.D. Ohio 1991) (emphasis in original).

unanimously to adopt the Report and its conclusions and recommendations. *Id.* at 138; Pet. App. A8. The Report and all of the documentary materials reviewed by the Propeller Guard Subcommittee were then forwarded to the Coast Guard. J.A. 47.

After considering these voluminous materials, the Coast Guard decided to accept all of the recommendations of the NBSAC and the Subcommittee Report. J.A. 163-167; Pet. App. A9. In particular, with respect to the NBSAC's recommendation that the "U.S. Coast Guard should take no regulatory action to require propeller guards," the Coast Guard concluded that "[a]vailable propeller guard accident data *do not support imposition of a regulation requiring propeller guards*." J.A. 163 (emphasis added). At the same time, the Coast Guard announced that it would continue to "review and retain any information * * * regarding development and testing of new propeller guarding devices or other information on the state of the art." *Ibid.*

In view of this extensive and uncontradicted record, the few courts that have considered claims such as petitioners' on the merits have reached the same conclusion as the Coast Guard regarding the feasibility and safety of propeller guards. Indeed, in each such case the court either granted summary judgment or directed a verdict for the manufacturer because of the failure of the plaintiff's proof. In *Elliott* v. *Brunswick Corp.*, 903 F.2d 1505 (11th Cir. 1990), cert. denied, 498 U.S. 1048 (1991), for example, "[b]oth parties' witnesses * * * testified regarding potential difficulties that these devices might engender" and "[b]oth parties' experts * * * explained that guards themselves can become a danger as they move through the water." 903 F.2d at 1509. Based on this undisputed evidence, the court concluded (*ibid.* (emphasis added)):

> [C]urrent industry standards, and the federal regulations, simply reflect the consensus of experts that the industry's adaption of propeller guards at this point *would not only be infeasible, but unwise, unsafe and unfortunate*.

To the same effect are *Allen* v. *Minnstar, Inc.*, 8 F.3d 1470, 1481 (10th Cir. 1993) ("the record shows * * * the absence of evidence that there was a feasible, safer alternative design for a propeller guard"), and *Pree* v. *Brunswick Corp.*, 983 F.2d 863, 867 (8th Cir.), cert. denied, 510 U.S. 815 (1993) ("[e]xperts for both sides * * * testified regarding the potential difficulties that propeller guards might

engender"). State courts looking at the available data have reached the identical conclusion. See, *e.g.*, *Fitzpatrick* v. *Madonna*, 424 Pa. Super. 473, 623 A.2d 322 (1993); *Beech* v. *Outboard Marine Corp.*, 584 So.2d 447 (Ala. 1991).

E. The Present Case

In 1993 petitioners' daughter "fell or was thrown" from the boat in which she was riding as a passenger on Strom Thurmond Lake, which is on the Georgia-South Carolina border. Pet. App. A3; J.A. 32. She was allegedly struck by the propeller of the boat's outboard engine and died immediately. Pet. App. A3-A4; J.A. 32. The engine, which was designed and manufactured by respondent Brunswick Corporation, was equipped with a traditional open-screw propeller commonly found on recreational boats. *Ibid.*

Petitioners sued the operator of the boat and recovered a large settlement. They subsequently brought suit against Brunswick in Georgia state court, alleging that the boat's engine was defectively designed because it lacked a propeller guard and seeking compensatory and punitive damages. Pet. App. A4; J.A. 12-13. Brunswick removed the case to federal court. Pet App. A4. The district court granted Brunswick's motion for summary judgment on petitioners' state tort law claims, concluding that the claims were preempted by the Boat Safety Act. *Ibid.*

The court of appeals affirmed. Pet. App. A1-A25. The Eleventh Circuit held that petitioners' common law claims were not expressly preempted by Section 4306 because of the presence of the "Savings Provision" in Section 4311(g). "[T]he savings clause indicates that at least some common law claims survive express preemption." Pet. App. A14. As a result, the court resolved its doubts about whether petitioners' claims were expressly preempted "in favor of the narrower interpretation of the preemption clause and conclude[d] that the express preemption clause does not cover common law claims." *Ibid.*

The court of appeals nonetheless concluded that petitioners' common law claims were impliedly preempted. The Eleventh Circuit held that state law "claims based on the failure to install a product that the Coast Guard has decided should not be required would conflict with the regulatory uniformity purpose of the [Boat Safety Act]." Pet. App. A22. "Given that Congress intended for the [Act] to create a

uniform system of regulation, and that the Coast Guard has determined that propeller guards should not be required, the Coast Guard's position mandates an absence of both federal and state propeller guard requirements." *Id.* at A20.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Boat Safety Act of 1971 establishes a comprehensive federal boat safety program to be administered by the Coast Guard and implemented, in large measure, by the States. Over one aspect of boat safety, however, Congress reserved exclusive regulatory authority to the Coast Guard: "the establishment of national construction and performance standards for boats and associated equipment." Senate Report at 15. Congress sought to promote uniform national standards so that "interstate commerce" would not be "impeded" by equipment and design requirements that varied from State to State. *Id.* at 14.

Exercising its authority under this federal regulatory scheme, the Coast Guard conducted an 18-month, painstaking investigation, which culminated in a decision that propeller guards should not be required on recreational boats. The lengthy administrative proceedings revealed that propeller guards often make boats *less* safe and are not economically feasible.

Petitioners now seek to undermine the Coast Guard's deliberate decision, as well as the congressional goal of uniform national design standards and requirements, by bringing suit to enforce a requirement under Georgia common law that recreational boats be equipped with propeller guards. The Supremacy Clause of the Constitution does not permit that result.

First, 46 U.S.C. § 4306 expressly preempts petitioners' common law claims because they seek to establish state law equipment requirements that are "not identical" to a federal regulation issued by the Coast Guard. As the Solicitor General explains (U.S. Br. 15), the Coast Guard has long held "the view that the [Act] preempts state-promulgated rules and regulations regardless of whether a federal standard is in existence." Petitioners' efforts to limit the words "law,""standards," or "requirements" in Section 4306 to state statutes and regulations, and to exclude state common law, have been consistently rejected by this Court, including as recently as *Medtronic, Inc.* v. *Lohr*, 116 S. Ct. 2240 (1996). The Court has repeatedly held

that state "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959).

By the same token, the Savings Provision in 46 U.S.C. § 4311(g) does not shield petitioners' common law claims from express preemption. Section 4311(g) has nothing to do with preemption; it states on its face only that, where suit may be brought under state law, Congress did not intend to provide an affirmative defense of compliance with federal standards. Indeed, because Section 4311(g) "saves" both "common law" *and* "State law," petitioners' argument would save *all* state law claims and would render the Act's express preemption provision a dead letter.

Second, regardless of the scope of Sections 4306 and 4311(g), petitioners' common law claims are impliedly preempted. It is undisputed that Congress gave the Coast Guard plenary authority over the issuance of uniform national boat construction standards and equipment requirements and that the Coast Guard, after a thorough investigation, determined that there should be no propeller guard requirement for recreational boats. It would frustrate the purpose of this comprehensive federal scheme for the States to second-guess the expert federal agency and impose just such a requirement.

Section 4311(g) does not dictate a contrary result. This Court has held for nearly a century that even broadly written savings provisions do not "save" state law claims that would conflict with or frustrate the purpose of a federal statute. Any other reading would cause the federal statute to "destroy itself." *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).

At bottom, petitioners' arguments turn federal preemption law upside down. Petitioners assert that — despite the comprehensiveness of the federal boat safety program, the clarity of Congress' purpose in reserving to the Coast Guard the authority to issue uniform national equipment and design requirements, and the presence of a broadly worded preemption provision covering this "field" — Congress meant to allow each State, through its common law, to impose standards and requirements different from the federal standards (and different from those of other States as well). Rather than a scheme of uniform national standards, the outcome under petitioners' regime would be chaos, with boating design and equipment requirements varying from

State to State — and even within a single State based on the case-by-case assessments of lay juries. In light of the language, structure, and purposes of the Act, Congress could not conceivably have intended that result.

ARGUMENT

The Supremacy Clause of the Constitution resolves any conflict between federal law and state law in favor of federal law. U.S. Const. art. VI, cl. 2; *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 362 (1986); *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). Federal "preemption" occurs in three contexts. First, Congress may expressly declare that state law is preempted. See *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 286-287 (1995); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). Second, Congress may implicitly override state law where the breadth of a federal statute indicates an intent to occupy the field. See *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990). Third, state law may conflict with federal law either by making it impossible "to comply with both state and federal requirements," *id.* at 79, or by standing "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Under each of these formulations, the preemption question turns on the intent of Congress, to be resolved through the usual tools of statutory construction. See *Rice* v. *Rehner*, 463 U.S. 713, 718 (1983).

Application of these familiar principles shows that petitioners' state law claims are preempted by the Boat Safety Act. Congress delegated to the Coast Guard plenary authority to establish requirements for equipment on recreational boats; after an extensive public investigation, the Coast Guard expressly determined that propeller guards should *not* be required on such boats. Yet petitioners seek to second-guess that federal determination and impose state law liability on respondent for not including a propeller guard on the boat that struck their daughter. Their proposed state law rule, however, is expressly preempted by the Boat Safety Act because it is not "identical to a regulation" issued by the Coast Guard, as required by the plain terms of 46 U.S.C. § 4306. Moreover, even in the absence of the express preemption provision, petitioners' proposed state law rule is impliedly preempted because it frustrates the purposes of the

federal boat safety scheme established by Congress, as well as the Coast Guard's studied determination that manufacturers should not be required to install propeller guards because they are ineffective and create safety hazards.

I. PETITIONERS' COMMON LAW CLAIMS ARE EXPRESSLY PREEMPTED BY THE BOAT SAFETY ACT

A. The Boat Safety Act's Preemption Provision Bars State Laws That Are "Not Identical" to a Coast Guard Regulation

The preemption analysis of petitioners' state law claims must begin with the text of the preemption provision of the Boat Safety Act. See *Medtronic*, 116 S. Ct. at 2251. Section 4306 states plainly and forcefully that (emphases added):

> *a State may not establish, continue in effect, or enforce a law or regulation* establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment * * * *that is not identical to a regulation prescribed under section 4302 of this title.*

As a threshold matter, in interpreting this provision, the traditional presumption against express preemption of state regulation of health and safety matters, see *Medtronic*, 116 S. Ct. at 2250, is inapplicable (or, at the very least, greatly diminished) in the context of the Boat Safety Act, which implicates the "historic federal maritime jurisdiction." Senate Report at 17. Indeed, in adopting the Act's preemption clause, Congress invoked the "long history of preemption in maritime safety matters." *Id.* at 20. Boat safety is simply not and has never been a subject of traditional state regulation.[9]

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[9] State law occasionally has been incorporated into admiralty law, but only to the extent that it is "consistent" with overriding "federal maritime principles and policies." *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 116 S. Ct. 619, 628 n.13 (1996). "The federal cast of admiralty law * * * means that 'state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system * * *.'" *Id.* at 626 n.8 (quoting *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 373 (1959)).

Consistent with this history, the text of the preemption provision is sweeping: no State may establish or enforce a law requiring an item of boat equipment that is "not identical" to a Coast Guard requirement on the subject. And, as the Solicitor General has acknowledged and the record clearly reflects, the Coast Guard has construed the text according to its plain meaning: "The Coast Guard has long interpreted [Section 4306] to preempt state positive laws and regulations, even when there is no counterpart federal regulation in effect under the Act." U.S. Br. 14. That is why the Coast Guard, the day after the Act was passed and before there were any federal regulations, temporarily exempted all existing state laws from preemption in order to avoid a regulatory vacuum. See 36 Fed. Reg. 15,764 (1971); see also, *e.g.*, J.A. 44-45 (although no federal regulation exists on liquified petroleum gas, Coast Guard opines that the Boat Safety Act's preemption provision "prohibits the states from establishing any requirement for associated equipment" concerning this matter).

It follows from the plain language of Section 4306 that petitioners' state law claims are expressly preempted by the Boat Safety Act. It is undisputed that they seek to "establish, continue in effect, or enforce" a rule of state law requiring propeller guards (which constitute "associated equipment") on a "recreational vessel" and that this state law rule is "not identical to" a Coast Guard regulation. To the contrary, the Coast Guard made a conscious decision *not* to issue a regulation requiring that boats be equipped with propeller guards.[10]

Petitioners' principal contrary argument (Pet. Br. 16-24) is based on a blatant misreading of the statute. They assert that, "[i]n order to fall under the domain expressly preempted, * * * Petitioner's claim must be a law, regulation, or requirement which *conflicts with* 'a regulation prescribed under section 4302' of the Act." *Id.* at 17 (emphasis added). See also Pet. Br. 3, 12. The words "conflicts with," however, appear nowhere in the statute. The Act on its face

[10] The alleged procedural deficiencies in the Coast Guard's decision not to impose a propeller guard requirement (see Pet. Br. 20-21 (*e.g.*, failure to comply with Administrative Procedure Act)) are irrelevant to the express preemption analysis. The only relevant inquiry is whether there is a federal regulation in place and whether the state law at issue is identical to that regulation.

preempts state laws that are "not identical to" a Coast Guard regulation. Indeed, petitioners' reading of Section 4302 would render the express preemption provision largely superfluous, because a state law claim that *conflicts with* a federal regulation would be *impliedly* preempted by operation of the Supremacy Clause. Congress clearly had something more in mind in *expressly* preempting state law equipment requirements.[11]

With no support in the statutory text, petitioners resort to misdirection. They cite this Court's decision in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), and argue (Pet. Br. 18-21) that the Court's holding in that case — that the absence of a federal regulation meant there was no express preemption under the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 *et seq.* — governs this case as well. "The Court [in *Freightliner*] held that * * * '[i]n the absence of a promulgated safety standard, the Act simply fails to address the need for ABS devices at all.' * * * This is strikingly similar to the situation at bar, since there is no promulgated safety standard which addresses propeller guards." Pet. Br. 19.

The fundamental flaw in petitioners' argument is that the preemption provision at issue in *Freightliner* is markedly different from that in the Boat Safety Act. As the Court noted, the Motor Vehicle Safety Act's "pre-emption clause applies only '[w]henever a Federal motor vehicle safety standard . . . is in effect.'" 514 U.S. at 286. But Congress chose a quite different formulation in Section 4306, which preempts any state laws that are not "identical" to a

[11] Petitioners' discussion (Br. 22, 35) of the regulatory treatment of "personal watercraft" is misleading. First, the Coast Guard has *never* taken the position that it must "promulgate actual regulations if it wished to create a potentially preemptive regulation" (*id.* at 22). Second, the quotation in petitioners' brief is from the report of the NBSAC advisory subcommittee, not the Coast Guard. Finally, the Coast Guard has the authority under Section 4305 to "exempt" personal watercraft from federal regulation and thereby leave such regulation to "State and Local jurisdictions." J.A. 130. If the Coast Guard does not grant an exemption from federal regulation, however, state and local authorities are precluded by Section 4306 from adopting any law or regulation that is "not identical" to a Coast Guard regulation.

federal regulation. The Solicitor General has explained the inapplicability of *Freightliner* to this case (U.S. Br. 16 n.8):

> The Court based its decision in *Freightliner* on the introductory clause of the preemption provision, which required, as a prerequisite for preemption, that a federal regulation be "in effect" for the same aspect of performance. * * * The [Boat Safety Act]'s introductory clause is not written in a comparably limiting manner.

Petitioners ultimately retreat to the "legislative history" of the Boat Safety Act in an effort to overcome the plain language of the preemption provision. They refer to the Senate Report, which states (at 19) that anyone "adversely affected by the promulgation of a standard may obtain judicial review in accordance with the Administrative Procedure Act." Petitioners argue (Pet. Br. 22) that because "Congress did not provide for any such relief in the absence of a promulgated standard," Congress could not have intended, as the text of the Act indicates, to preempt state law that is "not identical to" a Coast Guard regulation.[12]

Even if legislative history were relevant to "the interpretation of an unambiguous statute" (*Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 808 n.3 (1989)), the snippet cited by petitioners hardly suggests that Congress did not mean what it said in Section 4306. The Senate Report merely observed that certain procedural protections would be available before anyone is subjected to a federal requirement under the Act. Comparable protections are not necessary when the Coast Guard determines that a certain item of equipment should not be required or that an area should not be regulated. Persons who seek to have the federal government impose a boating standard do not lack a remedy: they may petition the Coast Guard to adopt a regulation (or

[12] Petitioners' invocation of the "presumption against pre-emption" (Pet. Br. 23) is, as discussed above (at page 17, *supra*), inapplicable here in light of the long history of exclusive federal control in the area of maritime safety. Moreover, petitioners' terse dismissal (Br. 23) of the notion that Congress would preempt the "field" of construction standards and equipment requirements ignores the explicit statement in the House Report (at 11) that "[t]he bill preempts the field on boating standards or regulations."

may persuade a State or local government to petition the Coast Guard to grant an exemption) under Sections 4305 and 4306. And the Coast Guard's final action may well be subject to judicial review under the Administrative Procedure Act. See 5 U.S.C. § 551(13); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415-416 (1971). But none of this has anything to do with the scope of the express preemption provision.

In any event, the legislative history emphatically reinforces the plain language of Section 4306. Congress gave the Coast Guard plenary authority over construction and performance standards and equipment requirements in the first instance (§ 4306), but allowed the agency to exempt state laws (§ 4305) on a case-by-case basis as it deemed appropriate (see pages 5-7, *supra*). The House Report (at 11) described this statutory scheme as "preempt[ing] the field on boating standards or regulations."[13] And, as the Solicitor General acknowledges, witness after witness testifying in support of the Act "emphasized the need for uniform federal construction and equipment standards." U.S. Br. 4 n.2. The language Congress chose achieved that result.

Finally, whatever the scope of Section 4306 in the situation where the Coast Guard has never addressed a specific equipment requirement, where (as here) the Coast Guard actually *considers* a requirement and *rejects* it, the States are barred by the express preemption provision from adopting that requirement. See *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir.), cert. denied, 116 S. Ct. 182 (1995); *Ryan* v. *Brunswick Corp.* 454 Mich. 20, 557 N.W.2d 541 (1997). A common law claim "requiring manufacturers to install propeller guards" is expressly preempted by Section 4306, because it is "not identical to the Coast Guard's regulatory position." *Carstensen*, 49 F.3d at 431; see *Medtronic*, 116 S. Ct. at 2260

[13] The Solicitor General obliquely suggests in a footnote (U.S. Br. 14 n.6) that the absence of a "savings provision" in the original House version of the Act undermines the broad statement on federal preemption in the House Report. As we discuss below (at pages 29-33, *infra*), however, the "Savings Provision" was perceived as a minor "technical" amendment that had no application to federal preemption.

(Breyer, J., concurring) (agencies have discretion in how to communicate their "particularized pre-emptive intentions").

In deciding that propeller guards should not be required, the Coast Guard complied fully with the substantive standards and procedures set forth in Section 4302. Although petitioners assert (Pet. Br. 33) that the decision was not the product of a "formal" rulemaking, the Coast Guard took pains to insure that the public was given notice and an opportunity to participate in the proceedings and was notified of the result. Thus, the agency provided notice of public meetings in the Federal Register, see 54 Fed. Reg. 42138 (1989); *id.* at 15068; 53 Fed. Reg. 43070 (1988); *id.* at 33210, and issued a written ruling explaining its final decision. J.A. 163-167. Petitioners apparently fault the Coast Guard for not having taken the senseless step of issuing a formal regulation stating its intention *not* to regulate — a result required neither by the Boat Safety Act nor by preemption law generally.

In sum, the Coast Guard considered carefully whether there should be a propeller guard regulation and, on the basis of a voluminous record justifying its decision, declared that propeller guards should not be required. Congress in Section 4306 has given preemptive effect to that express regulatory determination.

B. The Preemption Provision of the Boat Safety Act Includes Within Its Scope State Common Law Claims

Based on the foregoing discussion, there can be no doubt that a Georgia *statute* or *regulation* requiring that recreational boats be equipped with propeller guards would be preempted by the Boat Safety Act. Petitioners and their *amici* nonetheless seek to distinguish an identical state *common law* requirement by arguing that "the preemption clause does not provide that 'common law' actions are preempted." Pet. Br. 24; see also U.S. Br. 17-19. Their position is ultimately premised on the notion that Congress intended the States to supplement the Coast Guard's regulatory scheme not through their legislatures or expert administrative agencies, but rather through lay juries acting on a case-by-case basis. This Court has repeatedly rejected that assertion in other comparable contexts, and there is no basis for a different conclusion here.

1. Section 4306 preempts a "State or political subdivision of a State" from adopting or enforcing a "*law* or *regulation* establishing a recreational vessel or associated equipment performance or other *safety standard* or imposing a *requirement* for associated equipment * * * that is not identical to a [Coast Guard] regulation" (emphases added). There is no basis for reading the broad phrases "state law or regulation," "safety standard," and "requirement" to exclude mandatory duties or requirements imposed by state common law. Indeed, in *Freightliner*, the Solicitor General agreed that the "sweeping term 'requirement'" subsumed common law liability. See No. 94-286, U.S. Br. 14.

Petitioners' contrary argument was explicitly rejected by the decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992). The Court in *Cipollone* held that the express preemption provision at issue in that case included common law duties even though it spoke only in terms of "'requirement[s] or prohibition[s] * * * imposed under State law.'" 505 U.S. at 519-524 (plurality opinion) (citation omitted); *id.* at 548-549 (Scalia, J., concurring). The Court stated that it made no difference that the preemption clause "fail[ed] to include a specific" reference to common-law claims (*id.* at 521):

> The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules.

See *id.* at 548-549 ("'requirement[s] or prohibition[s]'" and "'State law' * * * embrace[] state common law") (Scalia, J., concurring).

The Court applied the same analysis in *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993), to the express preemption clause in the Federal Railroad Safety Act, under which "applicable federal regulations may preempt any state 'law, rule, regulation, order, or standard relating to railroad safety.'" Relying on *Cipollone*, the Court held that "[l]egal duties imposed * * * by the common law fall within the scope of these broad phrases." *Ibid.* This holding was entirely consistent with the Court's prior interpretation and usage of these same "broad phrases" in other contexts. See, *e.g.*, *Norfolk & W.R. Co.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991) (preemption of "'all other law, including State and municipal law' is clear, broad and unqualified. It does not admit of the

distinction * * * between positive enactments and common law rules of liability"); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 100 (1972) (giving the word "laws," as used in 28 U.S.C. § 1331, its "natural meaning" to include common law claims).[14]

The holdings in *Cipollone* and *Easterwood* were recently reaffirmed in *Medtronic*, where a majority of the Court endorsed the proposition that the word "requirement" encompasses state law tort claims for purposes of federal preemption. 116 S. Ct. at 2259-2260 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 2262-2264 (O'Connor, J., Rehnquist, C.J., and Scalia and Thomas, JJ., concurring in part and dissenting in part). As Justice O'Connor observed, "[w]hether relating to the labeling of cigarettes [*Cipollone*] or the manufacture of medical devices [*Medtronic*], state common-law damages actions operate to require manufacturers to comply with common law duties," and are therefore expressly preempted by a federal statute that bars state "requirements." *Id.* at 2262-2263; see *id.* at 2259 ("One can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law") (Breyer, J.).

The Court's approach in *Cipollone*, *Easterwood*, and *Medtronic* is ultimately premised on its longstanding recognition that "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)); see *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 277-278 (1964) (holding that common law claims are "'a form of regulation'"). Where, as here, Congress has expressed a strong interest in creating uniform national standards and in preempting inconsistent state duties, it would be irrational to read broad and generic phrases such as "law," "regulation," "standard," or "requirement" in a grudging and artificial way so as to exclude requirements imposed by a State's common law. See *Chicago*

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[14] See also *Atherton* v. *Federal Deposit Ins. Corp.*, 117 S. Ct. 666, 675 (1997) (deciding whether "federal common law standards" created "a general standard of care"); *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 114-115 (1987) (referring to state common-law "safety standards"); *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) ("negligence standards of the common law").

& N.W. Transp. Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981) (a "system under which each State could, through its courts, impose * * * its own * * * requirements could hardly be more at odds with the uniformity contemplated by Congress"); see also *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 498-499 n.19 (1987) (rejecting the contention that "compensatory damages only require the [defendant] to pay * * * and thus do not 'regulate'").[15]

Indeed, as Justice Breyer noted in *Medtronic*, "a contrary holding would have anomalous consequences." 116 S. Ct. at 2259. If Congress were intent on creating uniform national standards and requirements, why would it preempt a state administrative regulation concerning a piece of equipment, such as a ventilation system, but not a common law rule on the same subject? "The effects of the state agency regulation and the state tort suit are identical," and it makes no sense "[t]o distinguish between them for pre-emption purposes." *Ibid.* To do so would be to "grant greater power * * * to a single jury than to state officials acting through state administrative or legislative lawmaking processes." *Ibid.* Because "the language of the statute and its legislative history provide little support for the[ir] proffered, counterintuitive reading," petitioners' arguments must be rejected. *Sheridan* v. *United States*, 487 U.S. 392, 402 n.7 (1988).[16]

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[15] Petitioners and their *amici* contend (Pet. Br. 24-28; U.S. Br. 23-24) that tort claims do not establish state-wide standards or requirements, but merely represent a jury's single judgment about "the design of [a] particular boat[]," *id.* at 24. This argument overlooks not only the regulatory impact of compensatory damages awards, but also the purpose and effect of punitive damages — which petitioners seek in this case. Because punitive damages are designed to punish and deter a defendant's conduct (see *BMW of North Am., Inc.* v. *Gore*, 116 S. Ct. 1589 (1996)), they have a broad regulatory effect.

[16] Petitioners contend (Br. 25-27) that the language of Section 4306, and in particular the reference to a "State or political subdivision of a State," indicates that Congress did not mean to preempt common law duties. See also U.S. Br. 18 & n.9, 19. But these same supposed "anomalies" were present in the many other cases in which this Court has found common law claims to be within the ambit of an express preemption provision. For example, the express preemption clause in *Medtronic* (21

(continued...)

2. Unable to distinguish the controlling precedents of this Court, petitioners assert (Br. 27) that, despite the plain language of the Boat Safety Act, Congress was willing to tolerate a conflict between state common law duties and federal law. In making this argument, petitioners rely on the decisions in *English* v. *General Elec. Co.*, 496 U.S. 72 (1990), *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174 (1988), and *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984).[17] The Solicitor General also quotes from the same cases (U.S. Br. 22-23) in arguing that Congress intended to exclude common law claims

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[16] (...continued)
U.S.C. § 360k(a)) precluded any "State or political subdivision of a State" from establishing or continuing in effect any "requirement" different from or in addition to a federal "requirement." See 116 S. Ct. 2248. The statute also allowed "a State or a political subdivision thereof" to apply for an exemption from the preemption provision (21 U.S.C. § 360k(b)). Nonetheless, the Court held that the preemption provision included common law claims. By contrast, petitioners' position fails to confront the anomaly that would arise from a distinction between "common law" claims and identical suits seeking damages based on state positive law. See, *e.g.*, Products Liability Act, N.J. Stat. Ann. §§ 2A:58C-1-58C-7 (codifying state common law on products liability); Ohio Products Liability Act, Ohio Rev. Code Ann. §§ 2307.71-2307.80 (same).

[17] Petitioners also rely (Br. 27) on *Yamaha Motor Corp.* v. *Calhoun*, 116 S. Ct. 619 (1996), but in that case the Court reaffirmed its longstanding view that "uniformity concerns" — particularly in the context of a "comprehensive" congressional scheme within the traditional federal maritime jurisdiction — compel "vindication of maritime policies demand[ing] uniform adherence to a federal rule of decision, with no leeway for variation or supplementation by state law." *Id.* at 626. For example, in applying the Death on the High Seas Act in *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 230 (1986), the Court rejected as "incongruous" the "idea that a Congress seeking uniformity in maritime law would intend to allow widely divergent state law wrongful death statutes to be applied on the high seas." So too, here, it is equally incongruous to conclude that a Congress deeply concerned about creating uniformity in "*national* construction and performance standards for boats and associated equipment," Senate Report at 15 (emphasis added), would allow States to impose widely divergent standards through their common law.

from the scope of the express preemption provision because "[t]he regulatory effect of a common law judgment is not as direct as that of positive enactments or prescriptions."

None of these cases, however, involved a statutory and regulatory scheme that was even remotely similar to the Boat Safety Act, and none presented a question of express preemption. In *Goodyear Atomic*, for example, the Court interpreted a statute waiving the federal government's immunity from state regulation of federal enclaves. In discussing the limits of that waiver, and whether state workers' compensation awards would interfere with a federal program, the Court distinguished between a State's "incidental" and "direct" regulation of federal activities. The Court ultimately concluded that there was "clear congressional authorization" for the state action (486 U.S. at 182) and that the "incidental regulatory pressure" of occasional workers' compensation awards was fully consistent with the federal scheme. *Id.* at 186. In particular, there was no claim in *Goodyear Atomic* that state law would frustrate any federal regulation or policy.

The decisions in *English* and *Silkwood* are equally beside the point. Both cases involved preemption under the Atomic Energy Act, which contains no preemption provision (see *Pacific Gas & Elec. Co.* v. *State Energy Comm'n*, 461 U.S. 190, 205 (1983)) and, in fact, explicitly preserves significant authority for the States (*e.g.*, 42 U.S.C. §§ 2018, 2021(b), 2021(k)). In *Silkwood*, the Court found no preemption of the common law claim because the Price-Anderson Act — which established an indemnification scheme for nuclear plant operators held liable under state tort law — constituted affirmative evidence of Congress' acceptance of state tort actions (464 U.S. at 251-256).[18] As the Court explained in *English*, 496 U.S. at 86, "the decision in *Silkwood* was based in substantial part on legislative history suggesting that Congress did not intend to include in the pre-empted field state tort remedies for radiation-based injuries."

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[18] The sole question in *Silkwood* was whether federal law preempted state punitive damages awards. It was common ground among the Justices that Congress intended to permit state tort claims for compensatory damages. Thus, *Silkwood* involved the availability of a particular remedy, not the question whether a state tort action was foreclosed by federal law.

These cases, which did not construe express preemption provisions, stand in marked contrast to the federal scheme under the Boat Safety Act. The regulatory effects of state compensatory and punitive damages awards are direct, not incidental. Moreover, the statute at issue here does not contain a "clear congressional authorization" for the States to play a role in setting boat design or equipment requirements and does not contain any indication that Congress was willing to tolerate tension between federal and state law. To the contrary, Congress expressly preempted *any* state law that is "not identical to" a regulation issued by the Coast Guard.

3. The Solicitor General also argues (U.S. Br. 20-21) that Section 4306 must be interpreted to exclude common law claims because tort law may "provide incentives for manufacturers to provide a higher standard of care than the 'minimum safety standards' mandated by the [Coast Guard] in federal regulations." To the extent that this argument is more than a policy disagreement with Congress, it turns on the phrase "*minimum* safety standards" — which, according to the Solicitor General, establishes a mere "floor with respect to safety measures" (*ibid.*).

The *uniform* national standards and requirements adopted under the Act cannot be dismissed so cavalierly. As the Senate Report explains (at 20 (emphasis added)), Congress carefully identified the single instance in which the States were authorized to "impose requirements * * * which *go beyond the federal requirements*" — *i.e.*, when necessary "to meet uniquely hazardous conditions or circumstances within the State." 46 U.S.C. § 4306. And even in that one narrow area, Congress gave the Coast Guard the power to disapprove any additional state requirements, so as to preserve the goal of national "uniformity" in boat design standards based upon marine expertise. Thus, there is no basis in the statute or its legislative history to infer that the national standards and equipment requirements are a "floor" on which the States are free to build an edifice of supplementary (and conflicting) state law standards and requirements.

Moreover, this Court has already rejected the proposition that Congress' use of the phrase "minimum standards" in a federal statute authorizing the promulgation of national standards "requires recognition of state authority to impose higher standards than the Secretary [of Transportation] has prescribed." *Ray* v. *Atlantic Richfield Co.*, 435

U.S. 151, 168 n.19 (1978). The statutory goal of uniformity would be subverted by such an interpretation. Thus, where (as here) "it is sufficiently clear that Congress directed the promulgation of standards on the national level," "minimum safety standards" may not be supplemented by state law. *Ibid.* The federal standards are "minimum" only because *manufacturers* are free to add to them.

C. The "Savings Provision" of the Boat Safety Act Does Not Shield Petitioners' Common Law Claims From Preemption

Petitioners' final argument against express preemption of their state law claims (Pet. Br. 28-31) is based on the Boat Safety Act's "Savings Provision," 46 U.S.C. § 4311(g). They contend that this provision indicates that Congress "did not intend to include common law actions within the domain pre-empted by the Act." Pet. Br. 28; see also U.S. Br. 21 ("the savings clause * * * makes clear Congress's explicit intent to preserve tort liability").

Section 4311(g), however, cannot bear the weight of this construction. Both the text and the legislative history of the "Savings Provision" demonstrate that it was not intended to address federal preemption at all.

1. Section 4311(g) provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." Petitioners and their *amici* focus heavily on the reference in this provision to "common law" (see Pet. Br. 28-31; U.S. Br. 21-24) but completely ignore the inclusion of the phrase "State law." Congress' explicit reference to "State law," however, wholly undermines petitioners' reliance on this provision to limit federal preemption under the Act.

If, as petitioners argue, Section 4311(g) must be construed to limit the scope of preemption in Section 4306, then the Savings Provision would completely nullify the preemption provision. As noted above, petitioners insist that Section 4311(g) indicates that Congress "did not intend to include *common law* actions within the domain pre-empted by the Act" (Pet. Br. 28 (emphasis added)). But the text of Section 4311(g) draws no distinction between *state common law* claims and other *state law* claims. If "state law" is substituted for

"common law" in the preceding quote, express preemption under the Act disappears: Congress "did not intend to include *state law* actions within the domain pre-empted by the Act."

Petitioners elsewhere concede that state "law" includes "legislative or executive decision-making processes." Pet. Br. 25; see also U.S. Br. 18 n.9 (state "law" refers to "state positive law imposing prescriptive requirements"). Thus, under petitioners' reading of Section 4311(g), a manufacturer could be held liable under a "state law" — including a state statute or administrative regulation — that imposes boat design or equipment requirements that are not identical to (or even flatly inconsistent with) a federal regulation issued under the Act. That result is, of course, plainly contrary to the preemption provision in Section 4306 — indeed, it robs that carefully crafted section of the Act of any purpose — but it is compelled by petitioners' reading of the Savings Provision.[19]

2. Contrary to petitioners' arguments, the text, structure, and legislative history of Section 4311(g) demonstrate that the Savings Provision was not designed to limit the scope of federal preemption under Section 4306 at all. As demonstrated above (at pages 7-8, *supra*), the provision was added as a "technical" amendment to the end of the statute in a section wholly apart from — and without any reference in the legislative history to — the preemption provision. Moreover, the text of the Savings Provision does not refer to federal preemption or to the limits of federal supremacy.

Instead, Section 4311(g) merely clarifies that Congress, in enacting the Boat Safety Act, did not intend to provide an affirmative defense of compliance with government standards in areas where Section 4306 allows suit to be brought under state law. That is what the provision quite literally says: "Compliance with [a federal standard or regulation] does not relieve a person from liability at common law or under State law." And the explanation in the Senate

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[19] The Solicitor General's reading of Section 4311(g) suffers from the same flaw. The Solicitor General asserts (U.S. Br. 21) that "the savings clause * * * makes clear Congress's explicit intent to preserve [common law] liability," but he makes no effort to explain how the Court could distinguish state common law claims from other state law claims without doing violence to the words of the statute.

Report (at 32 (emphasis added)) is fully in accord with this language: the "purpose of the section is to assure that in a product liability suit *mere compliance* by a manufacturer with the minimum standards promulgated under the Act will not be a *complete defense* to liability."

Consistent with this limited purpose, the Report goes on to state that "depending on the rules of evidence of the particular judicial forum, such compliance may or may not be admissible for its evidentiary value." If, in fact, the Savings Provision were actually addressed to federal preemption, there would have been no reason for Congress to be concerned with state evidentiary rules or the admissibility of a manufacturer's compliance.[20]

Thus, rather than limiting federal preemption, the Savings Provision precludes manufacturers from relying on compliance with federal standards as a defense to state law liability in areas where state law still has a role to play, *e.g.*, in areas unrelated to design, construction, and performance standards or equipment requirements. For example, a manufacturer could not avoid liability for breach of warranty by relying on its compliance with Coast Guard standards. See Senate Hearing at 48 (statement of Admiral Bender). Similarly, where a State has supplemented a federal requirement because of "uniquely hazardous conditions or circumstances," or been granted an exemption under Section 4305, a manufacturer could not avoid liability under state law by claiming compliance with the federal standards.

Finally, as the Eleventh Circuit suggested (Pet. App. A22), a manufacturer might also be liable under state law for negligently manufacturing or installing a safety device that was required by a federal regulation. See also Senate Hearing at 48 (statement of Admiral Bender). For example, in *Mulhern* v. *Outboard Marine Corp.*, 432 N.W.2d 130 (Wis. Ct. App. 1988) (defective throttle), the

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[20] Although petitioners and the Solicitor General rely on the testimony of the Executive Director of the Boat Owners Association of the United States, that testimony supports our position. See Pet. Br. 28; U.S. Br. 22 n.12. This witness asked that Congress add a "savings provision" — which he described as an amendment "technical in nature" — to "clarif[y] that compliance with standards issued under the Act does not relieve the manufacturer from liability under State or common law in private law suits." Senate Hearing at 88.

court held that state tort claims based on defectively manufactured or installed equipment were not preempted by the Act. As the Eighth Circuit observed in *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430, 432, cert. denied, 116 S. Ct. 182 (1995), "common law claims asserting liability for defectively designed products that are actually installed may not be preempted," even though their installation was required by federal standards. Many, if not most, tort claims involving boat equipment are likely to fall into these categories.

In sum, there are several important areas of state law liability that are saved by the Savings Provision — without interfering in any way with Congress' intent in Section 4306 to preempt the "field" of boat construction and performance standards and equipment requirements. This interpretation of Section 4311(g) is faithful to the statutory language and gives full effect to both the preemption and savings provisions. Petitioners' implausible and internally inconsistent reading, by comparison, cannot be reconciled with the wording, structure, or legislative history of the Act. The "short answer is that Congress did not write the statute that way." *United States* v. *Monsanto*, 491 U.S. 600, 611 (1989).[21]

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[21] Petitioners complain (Br. 23, 38) that Congress could not have intended to remove their "tort remedies without comment." But Congress did comment expressly in Section 4306 and throughout the legislative history of the Act that state laws that are not identical to federal equipment requirements are preempted. Moreover, petitioners' assertion that they would be left uncompensated for "tortious behavior" assumes that the absence of a propeller guard was tortious, and thus is nothing more than a quarrel with the Coast Guard's determination that manufacturers should not be required to include such equipment. In any event, this Court often has found federal preemption "even when the state action purported to authorize a remedy unavailable under the federal provision." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 55 (1987); see, *e.g.*, *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 391 n.4 (1987) (rejecting notion that there is no federal preemption unless the federal scheme "provides the plaintiff with a remedy"); *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 584 (1981) ("finding that federal law provides a shield for the challenged conduct will almost always leave the state-law violation unredressed"); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 154-155 (1964) (Jones Act preempts state law even though plaintiff had no cause of action

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Petitioners' common law claims seek damages for violation of a duty imposed by Georgia law that the boat built by Brunswick be equipped with a propeller guard. It is undisputed that this state law requirement is not identical to an equipment requirement imposed by federal law. It is, in fact, contrary to the Coast Guard's considered judgment in the matter. Thus, the state law claims are expressly preempted by Section 4306 and are not saved from preemption by Section 4311(g).

II. PETITIONERS' COMMON LAW CLAIMS ARE IMPLIEDLY PREEMPTED BY THE COAST GUARD'S DECISION THAT PROPELLER GUARDS SHOULD NOT BE REQUIRED

A. Petitioners' Attempt to Second-Guess the Coast Guard's Rejection of a Propeller Guard Requirement is Barred by the Supremacy Clause

After an 18-month investigation of propeller guards and propeller-strike incidents, which included nationwide public hearings, a review of voluminous documentary and video evidence, and several physical demonstrations (see pages 8-12, *supra*), an expert federal advisory committee produced a lengthy Report recommending that there should be "no regulatory action to require propeller guards." J.A. 73. The Coast Guard, after reviewing the Report and all of the underlying evidence, independently concluded that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motorboats." *Id.* at 163.

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[21] (...continued)
under the Act).

We note in addition that, in most cases involving a propeller-strike accident, the plaintiff has a cause of action against the boat operator, unrelated to the Coast Guard's standards. See J.A. 72-73 ("[o]perator error is clearly a significant factor in the vast majority of underwater impacts which result in injuries/fatalities"). Here, for example, petitioners brought suit against the operator of the boat, which they later settled. Thus, as a practical matter, plaintiffs do have a tort remedy for propeller-strike accidents that is not preempted by federal law.

In light of this compelling and uncontroverted record, petitioners' common law claims are impliedly preempted under the Boat Safety Act by operation of the Supremacy Clause. If allowed to proceed with their tort claims, petitioners propose to hold Brunswick liable for potentially massive compensatory and punitive damages (J.A. 12-13) for failing to do what the Coast Guard has decided Brunswick should not be required to do: install propeller guards on its boat engines. This state law requirement would conflict with and frustrate the purposes of the federal regulatory scheme — both by countermanding the Coast Guard's decision that there should not be a propeller guard requirement and by undermining the national uniformity of standards and equipment requirements mandated by Congress.

Consider the facts of this case. The boating accident at issue occurred on Strom Thurmond Lake, which forms part of the border between Georgia and South Carolina. Petitioners seek to enforce a duty, imposed by Georgia common law, that would require propeller guards on at least some recreational boats. Under petitioners' interpretation of the Act, however, South Carolina would be free to adopt the opposite common law rule: propeller guards may not be installed, because (as the courts that have addressed the issue have concluded (see pages 12-13, *supra*)), they could make boats more dangerous. In this situation, no recreational boat could operate on Strom Thurmond Lake without subjecting the manufacturer to the possibility of damages under conflicting state laws.

The Supremacy Clause will not permit that result. Congress and the Coast Guard have acted to eliminate any conflicting state laws by adopting "national construction and performance standards for boats and associated equipment." Senate Report at 15. Any state law that conflicts with or frustrates the purposes of this comprehensive federal program is preempted. See *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Freightliner*, 514 U.S. at 287. Particularly where, as here, the Coast Guard has focused on an item of equipment and decided that it should not be required, a State may not impose a contrary requirement on manufacturers. As the Eleventh Circuit concluded (Pet. App. A22), in joining every other court to consider the issue of

preemption,[22] state law cannot punish "the failure to install a product that the Coast Guard has decided should not be required."

Petitioners offer two responses. First, they assert (Br. 31-32) that Congress intended to bar any implied preemption analysis under the Boat Safety Act — in effect, that Congress was indifferent to whether state law frustrated the purposes of the federal statute. Second, they contend (Br. 33-38) that their common law claims would not frustrate the federal regulatory scheme — in effect, that the Coast Guard was indifferent to whether boats should be equipped with propeller guards. Petitioners offer no credible support for these remarkable assertions.

B. Implied Conflict Preemption is Fully Applicable Under the Boat Safety Act

Relying on this Court's preemption analysis in *Cipollone*, 505 U.S. at 517-518, petitioners initially contend that the text of the Boat Safety Act alone provides a "reliable indicium of Congressional intent" to preclude implied conflict preemption of all common law claims (Pet. Br. 32). Thus, petitioners assert (*ibid.*) that the absence of a reference to common law duties in Section 4306, and the language of the "Savings Provision" in Section 4311(g), combine to show a congressional intent not "to imply further pre-emption." Pet. Br. 32.

For the reasons discussed above (at pages 17-33, *supra*), petitioners are wrong in their assumption that Congress meant to exclude state common law duties from express preemption. But

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[22] See *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir.), cert. denied, 116 S. Ct. 182 (1995); *Ryan* v. *Brunswick Corp.*, 454 Mich 20, 557 N.W.2d 541 (1997); *Moss* v. *Outboard Marine Corp.*, 915 F. Supp. 183 (E.D. Cal. 1996); *Davis* v. *Brunswick Corp.*, 854 F. Supp. 1574 (N.D. Ga. 1993); *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991); *Parker* v. *Outboard Motor Corp.*, No. J90-0011(L) slip. op. at 2 (S.D. Miss. Feb. 28, 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012 (N.D. Ohio 1991); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562 (Ill. App. Ct. 1992), app. denied, 616 N.E.2d 333 (Ill. 1993); but cf. *Moore* v. *Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246 (Tex.), cert. denied, 513 U.S. 1057 (1994) (failing to address implied preemption because of the presence of the express preemption clause — an analysis rejected by this Court in *Freightliner*).

regardless of the scope of Sections 4306 and 4311(g), petitioners have offered *no* evidence that Congress intended simply by enacting these provisions to cast aside the traditional restrictions on state authority "by direct operation of the Supremacy Clause." *Brown* v. *Hotel & Restaurant Employees*, 468 U.S. 491, 501 (1984).

To the extent that petitioners argue that the mere presence of an express preemption clause in the Act precludes implied preemption (see Pet. Br. 32 ("this invitation for imprecise guesswork as to Congress' intent is exactly why implied pre-emption is eschewed in the face of an express preemption clause")), this Court has already disposed of that argument. In *Freightliner*, the Court emphatically rejected the proposition "that implied pre-emption cannot exist when Congress has chosen to include an express preemption clause in a statute." 514 U.S. at 287. The Court dismissed this contention as premised on a plain misreading of a single sentence in *Cipollone*, in which the Court had observed that (505 U.S. at 517):

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone* v. *White Motor Corp.*, 435 U.S. at 505, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

The *Freightliner* Court rejected as entirely "without merit" any interpretation of this sentence (such as that urged by petitioners) that would preclude an implied preemption inquiry in the face of an express preemption clause. 514 U.S. at 287. "The fact that an express definition of the pre-emptive reach of a statute 'implies' — *i.e.*, supports a reasonable inference — that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption." *Id.* at 288. Indeed, the Court in *Freightliner* then proceeded to engage in a traditional implied preemption analysis of the common law claims at issue. *Id.* at 289-290.

The Court reaffirmed this view in *Medtronic*. There, the plurality opinion by Justice Stevens found that certain common law claims were not expressly preempted by the Medical Device Amendments of 1976 to the Federal Food, Drug, and Cosmetic Act, but observed that such

claims might still be "pre-empted under conflict pre-emption analysis." 116 S. Ct. at 2259. And just last Term in *Boggs* v. *Boggs*, 117 S. Ct. 1754, 1762 (1997), the Court decided the case on the basis of implied conflict preemption under the Employee Retirement Income Security Act even though that statute has an express preemption clause. In fact, the Court has often considered (and accepted) implied preemption arguments in cases involving federal statutes with express preemption provisions.[23]

It is, in the final analysis, bizarre in the extreme to attribute to Congress an intent to permit state law to destroy a comprehensive federal safety program merely because it includes an express preemption provision in a federal statute. Why would Congress, by precluding one area of state action, want thereby implicitly to authorize other areas of state action that would make the federal scheme ineffective? If that were the law, "only the most sporting of Congresses will dare say anything about preemption." *Cipollone*, 505 U.S. at 548 (Scalia, J., concurring in part) Petitioners do not, and cannot, offer a satisfactory explanation.

C. Petitioners' Common Law Claims Would Frustrate the Purpose of the Coast Guard's Decision On Propeller Guards and Would Undermine Congress' Goal of Creating Uniform National Standards and Requirements

Petitioners and their *amici* advance several arguments in an attempt to show that, even if an implied preemption analysis is permissible, their state law claims do not frustrate the purposes of the

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[23] *See, e.g., Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142-143 (1990); *Northwest Cent. Pipeline Corp.* v. *Kansas Corp. Comm'n*, 489 U.S. 493, 509-522 (1989). In *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977), the Court concluded that, although the express preemption provision of the Fair Packaging and Labeling Act, 15 U.S.C. § 1461, did not preempt the state law at issue, the Supremacy Clause prohibited enforcement of that law because it conflicted with the federal statute and prevented "the accomplishment and execution of the full purpose and objectives of Congress." *Id.* at 526, 540-543 (internal quotation marks omitted). The Court held that "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict." *Id.* at 525-526.

Boat Safety Act. These arguments, however, all founder on the historical record, which shows unequivocally that the Coast Guard determined that propeller guards should not be required on recreational boats because of safety and economic considerations. Given this judgment by the expert federal agency, States may not impose an inconsistent requirement.[24]

1. The Solicitor General begins with the carefully guarded statement (U.S. Br. 25-26 n.17) that the Coast Guard did not "necessarily" adopt one of the rationales of the Propeller Guard Subcommittee and the NBSAC — *i.e.*, that propeller guards often make boats less safe (J.A. 66-74) — in endorsing their recommendation that propeller guards should not be required. But the Solicitor General does not and cannot dispute that the Coast Guard decided, after a thorough review of the available safety data, not to impose a propeller guard requirement. Moreover, the Solicitor General never affirmatively states that the Coast Guard believes that propeller guards are safe.

In fact, *post hoc* rationalizations of counsel aside, the extensive record on the issue of propeller guard safety at the time the Coast Guard issued its decision is so compelling (see pages 8-12, *supra*) that any reasonable person — and, in particular, any boat manufacturer — would necessarily have concluded that, in adopting the recommendation of the NBSAC, the Coast Guard shared its rationales. Those rationales were that propeller guards are ineffective and often unsafe, and that, even if propeller guards did not themselves create independent safety hazards, requiring such equipment — in light of the few propeller-strike incidents each year — would impose a "prohibitive cost" on manufacturers with "only a negligible impact on improving boat safety." J.A. 71-72.

The Solicitor General simply mischaracterizes the record by suggesting that the Propeller Guard Subcommittee did not study a "range" of different propeller guards and their efficacy on different

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[24] Brunswick has never argued, and the Eleventh Circuit did not hold, that it would be impossible for it to comply with the Coast Guard's regulations and petitioners' common law standard. The argument in petitioners' brief on this issue (at 33-34; see also U.S. Br. 26) is simply a straw man.

types of boats and propulsion systems. U.S. Br. 23-24. The record shows that, at the direction of the Coast Guard (J.A. 76), the Subcommittee reviewed the "many variations" of propeller guards, and focused on the "three basic configurations" (*id.* at 60). Similarly, at the request of the Coast Guard (*id.* at 76), the Subcommittee reviewed different types of propulsion units and different boat and hull designs and the efficacy of propeller guards on each (*id.* at 58-60).

The Subcommittee's conclusions about propeller guard safety and cost effectiveness, and its resulting recommendation that the Coast Guard should reject a propeller guard requirement, were self-evidently based on this exhaustive investigation. The Subcommittee's conclusions included generalized safety concerns about all propeller guards, as well as specialized concerns about particular propeller guards or their use on certain types of boats or propulsion systems. For example, the Subcommittee concluded that "mask and ring-type guards" present significant risk of "blunt trauma injury * * * at speeds over 10 mph." J.A. 69. "Propellers encased in the Kort nozzle, or tunnel," on the other hand, "substitute impact for propeller cut hazard, have rapid loss of efficiency above 10 mph and are not operationally feasible at normal pleasure boat speeds." *Id.* at 70. And "[w]ater jet propulsion" causes a "loss in efficiency and results in newly created operational handling problems." *Ibid.*

Several of the Subcommittee's safety concerns, such as the adverse impact of propeller guards on "boat operation" and handling at normal boating speeds in excess of 10 miles per hour, applied to all types of propeller guards on all types of propulsion systems. J.A. 70. Other safety concerns were quite specific. Thus, the Subcommittee considered and rejected on safety grounds a proposal that propeller guards be included on "water ski boats" or on "boats equipped with swimming platforms and ladders." *Id.* at 71.

Based on its extensive analysis, the Subcommittee concluded that the use of propeller guards can "be counterproductive and can create new hazards of equal or greater consequence." J.A. 72. In addition, the Subcommittee found that because propellers cause injury "in only a minority of underwater impacts," and because the cost of "retrofit[ting] 10 to 15,000,000 existing boats" would be huge, a propeller guard requirement would not be "economically feasible." *Id.* at 71-

72. The Act specifically directs the Coast Guard and the NBSAC to make this kind of assessment. See 46 U.S.C. § 4302(c)(3).

Accordingly, contrary to the impression created in the Solicitor General's brief, the Subcommittee's conclusions applied to a wide variety of propeller guards, propulsion systems, and boats; it was not simply a determination that a "universal" safety guard was infeasible. And these broad conclusions, adopted unanimously by the NBSAC, supported the recommendation to the Coast Guard that there should not be a propeller guard requirement for recreational boats. In short, the Subcommittee's and the NBSAC's conclusions and recommendations were clearly based on overriding safety and economic concerns.

In light of this record, it is difficult to credit the Solicitor General's revisionist view, offered for the first time years after the fact, that the Coast Guard adopted the recommendations of the Subcommittee and the NBSAC on propeller guards but perhaps not their supporting safety rationale. In any event, whether the Coast Guard refused to adopt a propeller guard requirement for safety concerns, economic concerns, or both, its decision would be frustrated by a mandatory state law requirement that boats be equipped with propeller guards.

2. Petitioners and the Solicitor General also protest (Pet. Br. 34-36; U.S. Br. 26-28) that the Coast Guard's decision does not have preemptive effect because the Coast Guard never promulgated a "formal" regulation on propeller guards. This argument grossly understates and mischaracterizes the Coast Guard's involvement in the propeller guard controversy. The agency's decision not to require propeller guards reflected not agnosticism or indifference but a conscious weighing of the regulatory costs and benefits. This was precisely the kind of federal "inaction *joined with action*" that this Court held in *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (emphasis added), preempts state law. In that case, the Court stated (*ibid.* (emphasis in original)):

> [D]eliberate federal inaction [does not] always imply pre-emption * * *. Where a comprehensive federal scheme intentionally leaves a portion of the regulated field [unregulated], *then* the pre-emptive inference can be drawn — not from federal inaction alone, but from inaction joined with action.

And this Court has repeatedly held that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate." *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (emphases in original); see also *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141, 151-152 (1989).[25]

Here, the Coast Guard, acting pursuant to its plenary authority under the Boat Safety Act — "a comprehensive federal scheme," *Puerto Rico Dep't of Consumer Affairs*, 485 U.S. at 503 — expressly determined that propeller guards should not be required. In light of the voluminous record documenting the federal decision to reject a propeller guard requirement, "the pre-emptive inference can be drawn — not from federal inaction alone, but from inaction joined with action." *Ibid.*

3. Petitioners respond (Br. 34-38) that this Court's ruling in *Freightliner* is indistinguishable from this case and compels the conclusion that the Coast Guard's decision to reject a propeller guard requirement is entitled to no preemptive effect. In fact, *Freightliner* strongly supports preemption here.

As discussed above (see pages 19-20, *supra*), *Freightliner* involved Federal Motor Vehicle Safety Standard 121, which "imposed stopping distances and vehicle stability requirements for trucks." 514 U.S. at 284. Because of the short stopping distances required by the standard, "several manufacturers notified NHTSA that ABS [anti-lock braking systems] would be required" to comply with Standard 121. *Id.* at 285. On judicial review of Standard 121, the Ninth Circuit set aside the standard because "NHTSA had failed to consider the high failure rate of ABS devices * * * [and] 'there [was] a strong probability that [ABS] had created a potentially more hazardous highway situation * * *.'" *Id.* at 285 (quoting *Paccar, Inc.* v. *NHTSA*, 573

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[25] "'[W]here failure of * * * federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute,' States are not permitted * * * to enact such a regulation." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978) (quoting *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947)).

F.2d 632, 642-643 (9th Cir.), cert. denied, 439 U.S. 862 (1978)). Thereafter, NHTSA amended Standard 121 "so that the stopping distance and lock-up requirements no longer applied to trucks and trailers." 514 U.S. at 285.[26]

The plaintiffs in *Freightliner* were involved in accidents with trucks manufactured by the defendants. They brought suit, "alleg[ing] that the absence of ABS was a negligent design that rendered the vehicles defective." 514 U.S. at 283. The defendants contended that these tort claims were impliedly preempted because NHTSA intended to leave the issue of truck stopping distances unregulated. This Court rejected that argument because it found

> no evidence that NHTSA decided that trucks and trailers should be free from all state regulation of stopping distances and vehicle stability. Indeed, *the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes*.

Id. at 286 (emphasis added).

This case is markedly different from *Freightliner* in several critical respects. First, unlike in *Freightliner*, there *is* conclusive evidence here that "the lack of federal regulation * * * result[ed] from an affirmative decision of agency officials to refrain from" requiring propeller guards. 514 U.S. at 286-287. The Coast Guard concluded that "[a]vailable propeller guard accident data do not support imposition of a regulation requiring propeller guards on motor boats." J.A. 163. Second, in *Freightliner* NHTSA plainly wanted to regulate stopping distances and vehicle stability, but was precluded by a court decision from doing so. Clearly, the agency's policies were not frustrated by a state law requirement addressing those aspects of vehicle performance.

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[26] NHTSA "left the unamended Standard 121 in the Code of Federal Regulations so that the 'affected sections [could] most easily be reinstated' when the agency met *Paccar*'s requirements. * * * NHTSA also stated that the provisions would remain in place so that manufacturers would know 'what the agency still considers to be reasonable standards for minimum acceptable performance.'" 514 U.S. at 285 (citations omitted).

Equally unpersuasive is the Solicitor General's contention that the Boat Safety Act does not give the Coast Guard "primacy in a particular regulated field." U.S. Br. 27. The Act delegates to the Coast Guard exclusive authority to issue boat construction and performance standards and equipment requirements. Whatever role the States may play in this area is subject to the Coast Guard's express approval. 46 U.S.C. §§ 4305, 4306. The Coast Guard also is given supervisory authority over state law enforcement and education programs under the Act See pages 2-4, *supra*. This is precisely the kind of case where "Congress intended to centralize all authority over the regulated area in one decisionmaker." *Freightliner*, 514 U.S. at 286.

Congress' stated goal in creating this comprehensive scheme was the adoption of *uniform national* construction and performance standards and equipment requirements. Senate Report at 20. As the Vice President of the National Association of State Boating Law Administrators testified, the Act provides (Senate Hearing at 98 (emphasis added))

> for Federal regulation of body design and detached equipment performance or safety standards, and *no State, without the consent of the [Coast Guard], may be more restrictive in equipment requirements, thereby assuring uniformity among the several Government jurisdictions*.

Thus, although the Solicitor General may be correct that Congress did not mean to "occupy the complete field of motorboat safety" (U.S. Br. 28), the Act quite plainly intended the federal government to occupy the "field" of boat design and equipment requirements.

Finally, the Solicitor General argues (U.S. Br. 26-27) that petitioners' claims are not impliedly preempted because they "do not hinder in any way the ability of the Coast Guard to promulgate federal regulations regarding propeller guards." But no state law claim would be impliedly preempted if *that* were the governing standard, no matter how destructive of the federal program. The question is not whether state law prevents what the Coast Guard might choose to do in the future; it is whether state law would frustrate the federal regulatory scheme as it *now* exists. And as the Solicitor General notes (U.S. Br. 7-8), the Coast Guard has continued to gather evidence and to seek

comments on effective devices to prevent propeller-strike accidents, but "has not yet issued any regulations to require" propeller guards.

D. The Savings Provision in the Boat Safety Act Does Not Shield Petitioners' Common Law Claims From Implied Preemption

Although petitioners' common law claims conflict directly and substantially with the Coast Guard's decision not to mandate propeller guards as an item of equipment on recreational boats, petitioners nonetheless contend (Br. 37-38) that the Act's Savings Provision saves these claims from implied preemption. Even if Section 4311(g) were viewed as a limitation on preemption (but see pages 29-33, *supra*), it indicates, at most, Congress' intent not to occupy the entire field of boat safety, so that state law claims could proceed in areas unrelated to "construction and performance standards for boats and associated equipment." Senate Report at 15. In the absence of the Savings Provision, defendants in such suits might have argued that the comprehensiveness of the federal scheme ousted the States from the field of boat safety entirely.

Faced with "savings clauses" in other statutes, this Court has consistently interpreted them in this fashion. In *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), for example, which held that a broadly worded savings clause was inapplicable where the plaintiff sought to impose common law liability for acts expressly permitted by a federal agency, the Court explained that general savings clauses do not allow states to enforce state law claims that conflict with or frustrate federal law. *Id.* at 328. Rather, such provisions are included in federal statutes because, without them,

> it might have been claimed that, Congress having entered the field, the whole subject of liability * * * had been withdrawn from the jurisdiction of the state courts, so [the savings clause] was added to make plain that the Act was not intended to deprive the state courts of their general and concurrent jurisdiction.

Ibid. (internal quotation marks omitted).

Similarly, in *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915), the Court found that a savings clause "was added at the end of the statute, not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections, but to

preserve all existing rights which were not inconsistent with those created by the statute." And in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), the Court held that a broad savings clause ("[n]othing in this act contained shall in any way abridge or alter [common law] remedies" (internal quotations omitted)) could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.*

This Court has consistently adhered to these views in interpreting similar savings clauses. See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-391 (1992) (Congress did not intend to "'undermine this carefully drawn statute through a general saving clause'") (quoting *International Paper Co.* v. *Ouellette*, 479 U.S. 494 (1987)); see also *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976).

As these precedents indicate, Section 4311(g) was added to the Boat Safety Act not to defeat the statutory goal of creating uniform national boat construction and performance standards and equipment requirements, but rather to evidence Congress' intent not to preempt the remainder of the field of boat safety. The Savings Provision does not, however, save petitioners' common law claims from implied preemption, because they would frustrate the Coast Guard's clear determination that propeller guards should not be required on recreational boats.

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At the end of the day, petitioners fail to provide any answer to the dispositive question of congressional intent: Why would Congress have given the Coast Guard plenary authority to craft a program of uniform national boat construction standards and equipment requirements, and have expressly precluded the Georgia legislature and administrative agencies from playing any role in that process, yet at the same time allowed Georgia courts and lay juries to reject the federal standards and to create a regime of disuniform state law equipment requirements? The incoherence of such a scheme is a convincing rebuttal to petitioners' arguments.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1998